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THE UNINDICTED CO-EJACULATOR AND NECROPHILIA: ADDRESSING PROSECUTORS' LOGIC-DEFYING RESPONSES TO EXCULPATORY DNA RESULTS

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This article addresses a prosecutor's development of new and bizarre theories, particularly in cases involving confession evidence, to explain away exculpatory DNA results. In Juan Rivera's case, the prosecutor's theory for why sperm found inside the 11-year-old victim on the day she was murdered did not belong to Rivera was that she had sex with someone before Rivera came along and raped (but did not ejaculate) and murdered her. The unnamed-lover theory is used so often by prosecutors that it has a moniker: "the unindicted co-ejaculator." In the case of the Dixmoor Five, teenagers convicted of the rape and murder of a 14-year-old girl were exonerated after DNA from semen found on the victim's body was linked to a man with a lengthy record of sexual assault and armed robbery. However, the state's attorney accepted the possibility that the convicted rapist wandered past an open field and had sex with the deceased 14-year-old victim as a means of validating the teenagers' confessions.

The article explores strategies to prevent cases like Rivera's, that are based on a prosecutor's logic-defying theory of guilt, from moving forward. Although prosecutors enjoy largely unfettered discretion, they must account for their actions at different stages of the criminal proceedings before bringing cases to trial. During the investigation phase, recording

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interrogations provides a measure of prosecutorial accountability. During the charging phase, acknowledging confirmation bias will guard against decisions to proceed in the face of contradictory exculpatory evidence. Potential judicial solutions, such as the doctrines of judicial estoppel and judicial admission and the proposed reform of criminal summary judgment, are advanced as additional means of preventing a case based upon a logic-defying theory of guilt from proceeding to trial. This article examines the question of prosecutorial accountability through the lens of Juan Rivera's case. Rivera spent almost twenty years in prison and underwent three trials before a court vacated his conviction, holding that the prosecutor's theory of guilt, in the face of exculpatory DNA results, was "unreasonable" and "improbable."

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I. INTRODUCTION

> DNA technology can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent.[1]

Prosecutors' willingness to acknowledge the exculpatory value of postconviction DNA results has varied widely among jurisdictions. Some prosecutors have embraced DNA's power to free innocent prisoners, going so far as to create "conviction integrity units" within their offices to investigate claims of actual innocence.[2] The nation's first Conviction

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[1] John Ashcroft, U.S. Attorney General, Attorney General News Conference (Aug. 1, 2001, 12:15 PM), http://www.usdoj.gov/archive/ag/speeches/2001/080101newsconference dna.htm.

[2] *See generally* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215,

Integrity Unit, established in Dallas County, has proactively worked to exonerate thirty-four people, including someone who did not seek out the DNA testing that proved his innocence.[3]

However, other prosecutors have developed new and bizarre theories, particularly in cases involving confession evidence, to explain away exculpatory DNA results. Many of the most outlandish and insidious theories were advanced against innocent suspects who falsely confessed and whose cases were championed by Rob Warden, the warrior for justice honored by this symposium. Warden, the co-founder and longtime Executive Director of the Center on Wrongful Convictions at Northwestern University School of Law, dedicated his career to freeing innocent prisoners and remedying causes of wrongful conviction. His focus on exposing and eradicating false confessions is appropriate since the majority of Illinois's known wrongful conviction cases involved false confessions.[4] Warden's work has had a profound impact on innumerable people including Juan Rivera, the Dixmoor Five, and Jerry Hobbs. Each falsely confessed and were prosecuted despite exculpatory DNA tests which led to only one logical conclusion: They were innocent.

In Rivera's case, the prosecutor's theory for why sperm found inside the eleven-year-old victim did not belong to Rivera was that she had sex with someone on the day she was murdered before Rivera came along and raped (but didn't ejaculate) and murdered her.[5] The unnamed-lover theory is used so often by prosecutors that it has its own moniker: "the unindicted co-ejaculator."[6] In the case of the Dixmoor Five, teenagers convicted of the rape

2250–56 (2010) (setting forth best practices for establishing conviction integrity units within prosecutors' offices and arguing that these units, alongside professional integrity programs, will have the greatest success in preventing prosecutorial errors and misconduct).

[3] Yamiche Alcindor, *Man's Exoneration Makes History*, USA TODAY, July 25, 2014, at 3A (discussing the successful work of the Dallas County District Attorney's Conviction Integrity Unit).

[4] Rob Warden, *Whither False Confessions*, 26 CBA REC., Feb.–Mar. 2012, at 28, 30 (explaining that between 1986 and 2012, false confessions contributed to 52.9 percent of known Illinois wrongful convictions); *see also* TRUE STORIES OF FALSE CONFESSIONS (Rob Warden & Steven A. Drizin eds., 2009) (assembling an anthology of thirty-eight articles chronicling false confessions cases). In TRUE STORIES OF FALSE CONFESSIONS, the articles are grouped into categories with shared attributes—including brainwashing, fabrication, mental fragility, police force, and unrequited innocence—and the editors provide an introduction and postscript to each section. They end by discussing policy reforms that would reduce the phenomenon of false confessions.

[5] People v. Rivera, 962 N.E.2d 53, 62–63 (Ill. App. Ct. 2011).

[6] Mark A. Godsey, *False Justice and the "True" Prosecutor: A Memoir, Tribute, and Commentary*, 9 OHIO ST. J. CRIM. L. 789, 794–95 (2012).

and murder of a fourteen-year-old girl were exonerated after DNA from semen found on the victim's body was linked to a man with a lengthy record of sexual assault and armed robbery.[7] When the exculpatory postconviction evidence was presented to the Cook County State's Attorney's Office, the State opined the convicted rapist engaged in necrophilia after wandering through a field and finding the deceased fourteen-year-old victim's body.[8] And in the last example, Hobbs was detained and charged with murdering his eight-year-old daughter and her friend, but DNA testing later excluded Hobbs as the source of semen, spermatozoa, and other biological material found on evidence gathered from his daughter's skirt and hands.[9] A single male was determined to be the source of all of the DNA profiles.[10] The prosecutor explained away the exculpatory DNA results by claiming the victim came into contact with the sperm while playing around the crime scene, a park where couples went to have sex.[11] Two years later the DNA profile was matched to a convicted sex offender who was serving a sentence for attacking three women and also was awaiting trial on a murder charge.[12] Moreover, the sex offender was friends with the second victim's older brother.[13] The same prosecutor then switched theories to posit—and this is hard to follow—that Hobbs' daughter got the biological material on her hands while visiting the house and then transferred it to her clothes and genital area after the sex offender masturbated at the second victim's home.[14]

These and other examples demonstrate the extreme lengths to which some prosecutors will go to protect flawed convictions.[15] The logic-defying

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[7] Rebecca Stephens, Comment, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309, 309–12 (2013).

[8] Richard Bierschbach et al., *Panel 3 Juveniles in the Innocence Project: Current Cases in Practice*, 18 CARDOZO J.L. & GENDER 615, 617–18 (2012).

[9] Hobbs v. Cappelluti, 899 F. Supp. 2d 738, 751 (N.D. Ill. 2013). Hobbs was interrogated for twenty-four hours and detained for five years until he was exonerated by the DNA evidence and released. *Id.* at 746.

[10] *Id.* at 751.

[11] *Id.*

[12] Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES MAG., Nov. 27, 2011, at 44.

[13] *Id*.

[14] *See id.* The prosecutor elaborated upon the theory: "They have popcorn-movie night, and the little girl is in the same bed where this guy did it . . . . How do we get colds? We touch our mouths, we touch our nose. What does a woman do after she urinates?" [The prosecutor then demonstrated a wiping action.] "Front to back, O.K.?" *Id.*

[15] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894–900 (2004). In the case of the Central Park Five,

theories advanced by prosecutors run counter to the government's fundamental interest in criminal prosecutions, "not that it shall win a case, but that justice shall be done."[16]

An overarching principle of our criminal justice system is that a prosecutor owes a duty of fairness to a defendant.[17] The majority of prosecutors are conscientious public servants who adhere to their ethical and constitutional obligations to ensure "that guilt shall not escape or innocence suffer."[18] The consequences of violating this principle are damaging and far-reaching. Litigating cases against innocent suspects drains resources,[19] devastates innocent defendants and their families, and harms public safety by allowing the actual perpetrator to remain free, often to commit additional

postconviction DNA testing on semen found on the assault victim's clothing matched a serial rapist, Matias Reyes, and excluded the five juveniles who were convicted of the crime. *Id.* at 898. Despite Reyes' statement that he acted alone, police officers advanced several theories in which Reyes and the five juveniles could have colluded in the assaults. *Id.* at 900. *See also* Hilary S. Ritter, Note, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Postconviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 826 (2005). When postconviction DNA tests excluded Roy Criner as a contributor to semen in the deceased victim's vaginal and rectal specimens, the State argued the victim was "promiscuous" as an explanation for why the evidence was not exonerating. *Id.*

[16] Berger v. United States, 295 U.S. 78, 88 (1935).

[17] *See, e.g.*, State v. Monday, 257 P.3d 551, 556 (Wash. 2011) ("The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated."); *In re* Jacobs, 802 N.W.2d 748, 752 (Minn. 2011) ("The prosecutor's duty 'to see that justice is done on behalf of both the victim and the defendant' overrides any individual or governmental interest in winning cases."); People v. Cochran, 145 N.E. 207, 214 (Ill. 1924) ("The state's attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen.").

[18] *Berger*, 295 U.S. at 88.

[19] In addition to the cost of the criminal case, financial expenditures can include defending lawsuits based on police misconduct. *See* Karen Hawkins, *Chicago Still Paying for Police Torture Claims*, ASSOCIATED PRESS, Aug. 16, 2011, *available at* LEXIS, Associated Press database (reporting the city of Chicago has spent at least $43 million defending lawsuits again one former Chicago police commander).

crimes,[20] which leads to an erosion of trust in the criminal justice system.[21] The question becomes why our criminal justice system lacks sufficient safeguards to prevent a case built upon a logic-defying theory of guilt from moving forward to trial. Although prosecutors enjoy largely unfettered discretion, they must account for their actions at different stages of the criminal proceedings before bringing cases to trial.

This article will examine the question of prosecutorial accountability through the lens of Juan Rivera's case. Rivera spent almost twenty years in prison and underwent three trials before a court vacated his conviction, holding that the State's theory of guilt, in the face of exculpatory DNA results, was "unreasonable" and "improbable."[22] Rivera was charged in 1992 with the brutal rape and murder of a young girl after he falsely confessed.[23] He was convicted in 1993 and when his conviction was reversed based on the cumulative effect of trial errors, he was retried and reconvicted in 1998.[24] In 2004, Rivera requested postconviction DNA testing, and in 2006, the court granted his motion for a new trial based on the exculpatory test results.[25] The DNA profile of the perpetrator was uploaded into the felon database, but no match resulted.[26] Rivera's third trial occurred in 2009, after DNA tests conducted in 2005 excluded him as the source of semen found on the victim.[27] The prosecutor obtained a conviction at Rivera's 2009 trial by arguing the exculpatory DNA evidence was either a result of contamination (which every expert discounted as improbable) or was deposited by the eleven-year-old victim's unknown and unidentified sexual partner.[28] Rivera was exonerated

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[20] *See, e.g.*, Peter Modaferri, Patricia Robinson & Phyllis McDonald, *When the Guilty Walk Free: The Role of Police in Preventing Wrongful Convictions*, THE POLICE CHIEF, vol. 77, no. 10, at 34 (Oct. 2010), http://www.nxtbook.com/nxtbooks/naylor/CPIM1010/#/34 (reporting the Innocence Project's documentation of forty-seven rapes and nineteen murders committed by people who remained at large because an innocent person was wrongly convicted of the crime they committed).

[21] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57 (2008) ("Exoneration cases have altered the ways judges, lawyers, legislators, the public, and scholars perceive the criminal justice system's accuracy.").

[22] People v. Rivera, 962 N.E.2d 53, 61, 63 (Ill. App. Ct. 2011).

[23] *Id.* at 55.

[24] *Id.*; Brief of Defendant-Appellant at 85, People v. Rivera, 962 N.E.2d 53 (Ill. App. Ct. 2011) (No. 09-1060) (discussing errors leading to reversal).

[25] *Rivera*, 962 N.E.2d at 56.

[26] *Id.* Rivera filed a lawsuit to compel the Federal Bureau of Investigation to compare the DNA recovered from the semen found in the victim against its national databank. Rivera v. Mueller, 596 F. Supp. 2d 1163, 1164–65 (N.D. Ill. 2009).

[27] *Id.*

[28] *Rivera*, 962 N.E.2d at 59, 62–63.

in 2012 after the Illinois Court of Appeals (hereinafter "*Rivera* Court" or "Court") held there was insufficient evidence to sustain his conviction.[29] The *Rivera* Court found the State's theories of guilt "distort to an absurd degree the real and undisputed testimony that the sperm was deposited shortly before the victim died."[30] In vacating the conviction, the Court acknowledged the impact its decision would have on the victim's family and friends who had suffered great anguish from her murder, and on Rivera's family and friends who had "suffered the nightmare of wrongful incarceration."[31]

Part II of this article will discuss the importance of DNA exonerations in the criminal justice system, how a false confession led to Rivera's conviction, and why exculpatory DNA results led to his exoneration. Part III will explore the prosecutor's role in obtaining the confession during Rivera's investigation and the reform movement to record custodial interrogations that occurred after his first conviction. Part IV will address a prosecutor's charging decision, how this process might contribute to solidifying a prosecutor's view of guilt in the face of contradictory exculpatory evidence, and suggested reforms to guard against charging innocent defendants. Part V will examine potential judicial solutions to these problems, such as the doctrines of judicial estoppel and judicial admission and the proposed reform of criminal summary judgment, all of which have been advanced as pre-trial means of preventing the State from advancing inconsistent theories or proceeding to trial when there is sufficient evidence to charge, but not to convict. Part VI will present the postscript to Rivera's case.

II. RIVERA'S FALSE CONFESSION— LESSONS LEARNED FROM DNA EXONERATIONS

Prior to 1993, when Rivera first went to trial, eleven people had been exonerated on the basis of postconviction DNA testing.[32] The importance of DNA in criminal investigations cannot be overstated. To date, more than 330 people have been exonerated after postconviction DNA testing established, to a scientific certainty, they were imprisoned for crimes they did not

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[29] The prosecutor did not appeal the Court of Appeals' decision. Mitch Dudek, *Set Free After More Than 19 Years*, CHI. SUN-TIMES, Jan. 7, 2012, at 2.

[30] *Rivera*, 962 N.E.2d at 63.

[31] *Id.* at 67–68.

[32] *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (providing the following breakdown of DNA exonerations by year: 1989 (2); 1990 (1); 1991 (3); and 1992 (5)).

commit.[33] The growth in DNA exonerations is in part due to advances in technology which allow forensic analysts to obtain profiles from minute traces of biological material previously untestable because the sample was too small or was degraded.[34] Current DNA technology can obtain profiles from minuscule samples of saliva, semen, sweat, skin cells, and cellular material found in the root of a hair.[35] Those profiles are uploaded into the Combined DNA Index System (CODIS), a vast, computerized state and federal registry containing over 11 million convicted-felon DNA profiles.[36] Thus, postconviction DNA testing not only has the power to free innocent prisoners, but can also identify the actual perpetrator through a match in the CODIS data bank or comparison against an alternate suspect.[37] In nearly half of the first 330 DNA exonerations, the true perpetrator was identified through the database, or matched to a known profile, after a wrongfully convicted prisoner's exoneration.[38]

Rivera's nearly twenty-year nightmare of wrongful conviction began with a horrific crime. On August 17, 1992, an eleven-year-old girl was brutally murdered in Waukegan, Illinois.[39] She suffered twenty-seven stab

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[33] THE INNOCENCE PROJECT, http://www.innocenceproject.org (listing current DNA exonerations).

[34] *See* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1470 n.109 (2007) ("The first DNA test . . . [required] a sample of biological material that was at least the size of a quarter. Subsequent development . . . revolutionized DNA testing by allowing samples of DNA contained in biological evidence to be copied without affecting the original sample.").

[35] NAT'L INST. OF JUST., U.S. DEP'T OF JUST., SPECIAL REPORT: USING DNA TO SOLVE COLD CASES (2002), https://www.ncjrs.gov/pdffiles1/nij/194197.pdf.

[36] *FBI CODIS–NDIS Statistics*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics.

[37] DNA typing's unique power to exonerate an innocent suspect who falsely confessed, as well as identify the true perpetrator, came to light during its first use in a criminal investigation. In 1986, Scotland Yard obtained a graphic confession from Richard Buckland, in which he admitted to the brutal rape and strangulation of two women in separate incidents. To solidify the cases against Buckland, police called upon Dr. Alec Jeffreys, who had recently developed a process of DNA typing. They submitted semen samples from both crimes to Jeffreys for DNA analysis. Jeffreys' conclusion, which stunned the police and the community, was that both girls had been raped by the same perpetrator, but Buckland was not that man. The police investigation ultimately led to Colin Pitchfork and subsequent DNA tests linked Pitchfork to the crimes. *See* HENRY C. LEE & FRANK TIRNADY, BLOOD EVIDENCE: HOW DNA IS REVOLUTIONIZING THE WAY WE SOLVE CRIMES 1–2 (2003).

[38] *DNA Exonerations Nationwide*, THE INNOCENCE PROJECT (Sep. 13, 2015, 9:32 PM), http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide.

[39] People v. Rivera, 962 N.E.2d 53, 55 (Ill. App. Ct. 2011).

wounds, was strangled, and incurred massive injuries as a result of having been vaginally and anally penetrated.[40] Six weeks later, police focused their attention on Juan Rivera, a nineteen-year-old former special education student with an IQ of 79, after a jailhouse informant told them Rivera had information about the killer.[41] Rivera voluntarily met with the police, agreed to provide them with samples of his blood and hair, and signed a statement describing a man he saw in the crime scene vicinity who was acting suspiciously and who had a fresh scratch on his face.[42]

When police found reason to doubt Rivera's statement,[43] they began an interrogation process that lasted four days and involved no fewer than ten law enforcement officers.[44] The interrogation culminated in more than twenty-four hours of near constant questioning, during which Rivera was deprived of sleep.[45] In the first three days, although Rivera gave varying accounts of his whereabouts on the evening of the crime, he maintained his innocence.[46] On the fourth day of the interrogation, around midnight, police once again called Rivera a liar and accused him of being in the apartment with the victim.[47] At this point, Rivera broke down, sobbed uncontrollably to the point of soaking his clothes, and nodded in the affirmative.[48] He then told a new story about his activities on the evening of the crime and implicated himself in the murder.[49] At 3 a.m., police typed a three-page statement for Rivera to sign, summarizing his new version of events.[50] However, Rivera's statement was inconsistent with facts gathered during the crime investigation.[51]

Police then consulted with the State's Attorney and provided him with

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[40] *Id.* at 56.

[41] *Id.* at 60, 64; Brief of Defendant-Appellant, *supra* note 24, at 4 (describing why the police began to focus on Rivera); Brief of Innocence Network at 4, *Rivera*, 962 N.E.2d 53 (No. 09-1060) (documenting Rivera's age at the time of his arrest).

[42] *Rivera*, 962 N.E.2d at 56.

[43] Brief of Defendant-Appellant, *supra* note 24, at 9 (Rivera told police he was at a party on the evening of the crime. Their follow-up investigation "revealed there was no party . . . triggering an interest in interviewing Rivera further.").

[44] *Rivera,* 962 N.E.2d at 67.

[45] Brief of Defendant-Appellant, *supra* note 24, at 6–17, 58. The two investigators who began the interrogation were so exhausted by the fourth day they could not continue and asked for replacements from a fresh team of interrogators. *Id.* at 13.

[46] *Rivera*, 962 N.E.2d at 57; Brief of Defendant-Appellant, *supra* note 24, at 4–9 (detailing what occurred during the days of interrogation leading up to Rivera's admission).

[47] Brief of Defendant-Appellant, *supra* note 24, at 8–9.

[48] *Id.* at 9.

[49] *Id.* at 9–10.

[50] *Rivera*, 962 N.E.2d at 57.

[51] Brief of Defendant-Appellant, *supra* note 24, at 13, 27.

Rivera's statement, discussing how it diverged from, and contradicted, evidence gathered during the murder investigation.[52] The group decided more interrogation was necessary to clear up the inconsistencies.[53] During the final interrogation session, police asked Rivera pointed questions about facts in his initial confession statement which they considered untrue and in response, Rivera changed a number of facts.[54] Following this, police typed up a new three-page document to present to Rivera.[55] It incriminated Rivera in the victim's murder and was different from the earlier statement. It included many of the key facts the prosecutor and police had considered problematic in Rivera's earlier statement and had sought to clarify.[56] Rivera signed the statement and was charged with capital murder.[57]

At the 2009 trial, where DNA evidence excluding Rivera and identifying the profile of an unknown male was presented, Rivera's confession was the centerpiece of the State's case. The trial prosecutor argued Rivera knew details "that only the killer would know and that were even unknown to the investigators themselves."[58] In its 2011 opinion, the *Rivera* Court rejected this argument, instead finding the evidence supported the inference that police fed information to Rivera during the interrogation.[59] Although the Court did not give the full details of the four-day interrogation process, as discussed in Part III *infra*, a complete picture reveals that Rivera was a vulnerable young man who was subjected to an abusive and coercive interrogation that resulted in his psychological breakdown, infliction of self-harm, and a false confession.[60] The *Rivera* Court acknowledged "[i]nnocent people do confess to crimes they did not commit" and found the evidence supported an inference that the details Rivera provided police "were the result of psychological suggestion or linguistic manipulation."[61] The *Rivera* Court also found that the jailhouse informant evidence presented by the State was

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[52] *Id.*

[53] *Id.*

[54] *Rivera*, 962 N.E.2d at 66–67; Brief of Defendant-Appellant, *supra* note 24, at 14–17.

[55] *Rivera*, 962 N.E.2d at 57.

[56] Brief of Defendant-Appellant, *supra* note 24, at 15–17.

[57] *Rivera*, 962 N.E.2d at 57. The prosecutor sought a death sentence, but the 1993 jury declined to impose it. Brief of Defendant-Appellant, *supra* note 24, at 17.

[58] *Id.* at 94.

[59] *Rivera*, 962 N.E.2d at 66–67.

[60] Although the court never mentions Rivera's age at the time of the interrogation, it states, without detailing the evidence, the defense presented testimony from jail employees about Rivera's mental and physical condition during the interrogation, as well as expert testimony regarding Rivera's mental health; his IQ of 79; and his third-grade reading level. *Id.* at 60.

[61] *Id.* at 65, 67.

insufficient to support the conviction, citing the inherent unreliability of informants, exposure of the "blatant motivations" of the informants who testified against Rivera to act out of self-interest, and the DNA evidence.[62]

Ultimately, it was the exculpatory DNA evidence which led the *Rivera* Court to take the unusual step of reversing the trial court judgment on the ground that the evidence was insufficient to sustain the conviction.[63] In doing so, the Court rejected the two alternate theories the State offered in response to the DNA results: (1) they resulted from contamination of the samples, and (2) the eleven-year-old victim was sexually active in the days before the murder.[64] The Court deemed both theories "highly improbable," finding that no reasonable fact finder could credit them beyond a reasonable doubt.[65] Notably, the scientific evidence did not support the contamination theory, since both the State and defense forensic experts testified that there was no such evidence.[66] Because the State did not present any evidence the victim was in a relationship with another man,[67] the Court found that the State's theories "distort to an absurd degree the real and undisputed evidence that the sperm was deposited shortly before the victim died."[68] In short, the Court reasoned "the DNA evidence provides no support to the State's theory that [the] defendant was the individual who committed the offense beyond a reasonable doubt; rather, the DNA evidence embedded reasonable doubt deep into the State's theory."[69]

III. PROSECUTORS' ROLE DURING AN INVESTIGATION

Prosecutors may be brought into an investigation prior to a suspect's arrest, as they were during Rivera's case, to shape the investigation's

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[62] *Id.* at 64–65. One informant had tried to sell Rivera's discovery materials to a reporter; the other lived with Rivera's family but was forced to leave for using drugs in the family's home. *Id.* at 64.

[63] *Rivera*, 962 N.E.2d at 67; *see* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Division*, 57 VAND. L. REV. 437, 478 (2004) ("[T]here appears to be universal agreement that appellate courts almost never reverse convictions on sufficiency grounds[.]").

[64] *Rivera*, 962 N.E.2d at 62–63.

[65] *Id.* at 62–63.

[66] *Id.* at 58–59.

[67] The prosecutor, in support of the unnamed lover theory, presented testimony from the victim's twin sister, who testified that when they were eight years old, a neighbor forced them to perform oral sex, and that she and the victim once showed each other how they masturbated. *Id.* at 58, 62–63.

[68] *Id.* at 63.

[69] *Id.* at 62.

direction and scope.[70] Rivera's final confession, procured after consultation with the prosecutor, was used by the State at the 2009 trial to counter the exculpatory DNA evidence. The prosecutor continued to give the confession more weight than the scientific evidence, despite the questionable circumstances of the confession. Moreover, between Rivera's first and third trials, a significant body of research had developed which further undermined the confession's reliability.[71] However, Rivera's jury did not have the benefit of objectively evaluating the reliability of his confession because the interrogation was not recorded[72] and the trial court excluded expert testimony on false confessions.[73] Although there is little to no oversight of a

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[70] *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 733–37 (1999) (describing the recent expansion of a prosecutor's investigative role, which includes: seeking search warrants or electronic surveillance orders; authorizing and supervising undercover operations; participating in, or directing interviews of witnesses; requesting voice exemplars, fingerprints, or other physical evidence from suspects and witnesses; and offering plea deals to informants in return for undercover assistance in cases and later testimony).

[71] *See, e.g.*, GISLI H. GUDIONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (2003) (summarizing decades of theoretical and empirical social science research on interrogations and confessions, analyzing how interrogation tactics can lead to false confessions); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008) (examining the history of interrogation in America, discussing causes and consequences of false confessions, and reviewing and analyzing policy reforms); Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 17–19 (2008) (documenting the association of certain interrogation tactics—isolation, extended interrogations, "minimization," and "maximization"—with false confessions); Drizin & Leo, *supra* note 15 (analyzing 125 cases where postconviction DNA testing exonerated individuals who falsely confessed); Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 512–20 (2006) (discussing empirical research on police interrogations and false confessions); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (reporting a study of sixty cases of police-induced false confessions); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) (describing and analyzing "why contemporary interrogation methods, if misdirected, used ineptly, or utilized improperly, sometimes convince ordinary, psychologically and intellectually normal individuals to falsely confess").

[72] Brief of Defendant-Appellant, *supra* note 24, at 10 ("According to the officers, there were video and audio recorders readily available nearby, but Rivera declined their invitation to have his statement taped[.]").

[73] *Rivera*, 962 N.E.2d at 55 ("[T]he trial court excluded certain expert witness testimony relating to the effect [Rivera's] psychiatric and psychological conditions were apt to have had on him and on the reliability of his statements during questioning using particular interrogative techniques.").

prosecutor's actions during the investigatory phase of a case,[74] the movement to record custodial interrogations provides a measure of accountability during this stage of the criminal case.

The prosecutor met with investigators after Rivera gave his first incriminating statement to discuss how to address facts in the statement law enforcement officers knew to be false.[75] The confession was central to indicting Rivera because no eyewitnesses or physical evidence connected him to the crime.[76] Yet the length of the interrogation and Rivera's assertions of innocence, followed by incriminating statements conflicting with the crime scene evidence, should have given the prosecutor pause in moving forward with the continued interrogation.[77] As more details emerged about the psychological and physical distress endured by Rivera, it is even more difficult to accept the prosecutor's endorsement of the confession. During the third night of questioning, Rivera suffered a psychological breakdown.[78] As he was experiencing this mental collapse, his interrogators hog-tied him, cuffing his hands together around one of his legs and wrapping the chain that ran between his leg shackles around the center of his handcuffs, so that he could not move at all.[79] Jail personnel observed Rivera in a catatonic state—eyes open but entirely unresponsive; they noticed that he had wounds from hitting his head against the wall of the interrogation room.[80] After that, Rivera was put in a padded "rubber room," designated for detainees who present a risk for suicide.[81] A psychiatric nurse who observed Rivera shortly afterwards diagnosed him with acute psychosis and testified he "was not in touch with the reality of what was going on around him."[82] When she checked on him later in the morning, she saw he was curled up in a fetal position in the corner of the rubber room and observed he had torn out pieces of his scalp.[83] The medical professionals at the jail prescribed Rivera anti-psychotic and other medications, which were not administered since Rivera's shackles

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[74] Little, *supra* note 70, at 746–50 (describing the historical development of "[t]he virtually unreviewable status of prosecutorial review").

[75] Brief of Defendant-Appellant, *supra* note 24, at 13, 27.

[76] *Rivera*, 962 N.E.2d at 61 ("The State acknowledges that there was no eyewitness testimony or forensic evidence positively connecting defendant with the crime.").

[77] Drizin & Leo, *supra* note 15, at 948 (finding that eighty-four percent of false confessions occurred after interrogations of six hours or longer).

[78] Brief of Defendant-Appellant, *supra* note 24, at 11–14.

[79] *Id.* at 13–14.

[80] *Id.* at 11.

[81] *Id.*

[82] *Id.* at 11–12.

[83] *Id.* at 12.

restrained him from engaging in self-injurious behavior.[84] Yet, when investigators retrieved Rivera from the rubber room and brought him to an interrogation room for the final round of questioning, they claimed not to notice anything unusual about his demeanor.[85]

As Rivera's case poignantly illustrates, a confession is given tremendous weight by a jury, resulting in a conviction even in the absence of evidence corroborating the confession.[86] The idea that an individual would confess to a crime, particularly a horrific crime such as murder, without being subject to physical torture is difficult to comprehend. However, false confessions are now known to be a common factor in convicting the innocent.[87] It is important to note that the officer conducting the interrogation is not embarking upon an objective fact-gathering mission. Rather, the investigator's sole purpose, as it was in Rivera's case, is to obtain a confession, or at minimum incriminating statements and admissions, in order to bolster the prosecution's case.[88] When the interrogation process is not recorded, tactics used by interrogators to elicit confessions cannot be objectively evaluated, misconduct is harder to detect, and supervisors do not have the opportunity to monitor and improve interrogation methods.

By the time of Rivera's third trial in 2009, a large body of research had developed explaining how and why the strategies of modern psychological interrogation can lead innocent persons to confess.[89] This research confirms that Rivera's interrogation bears hallmarks of a false confession. His personal characteristics and certain situational factors—the length of the interrogation, sleep deprivation, and his re-interrogation after providing false information—are now associated with false confessions. Specifically, research shows that interrogations that last more than six hours are

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[84] *Id.* at 14.

[85] *Id.*

[86] Drizin & Leo, *supra* note 15, at 960 (discussing data showing false confessors, *i.e.*, individuals who later proved to have false confessions, who chose to take their cases to trial stood more than eighty percent chance of conviction).

[87] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8 (2011) (discussing how in the first 250 DNA exonerations, sixteen percent confessed to crimes they did not commit).

[88] Drizin & Leo, *supra* note 15, at 911 ("[T]he singular purpose of American police interrogation is to elicit incriminating statements and admissions—ideally a full confession—in order to assist the State in its prosecution of the defendant.").

[89] *See supra* note 71 (citing books and articles on police interrogation and false confessions published prior to 2009).

disproportionately likely to lead to false confessions.[90] Younger suspects are more likely to confess more readily than older suspects, as are suspects who have low IQs.[91] Individuals suffering from a psychiatric disorder may be vulnerable because they are unable to distinguish fact from fantasy.[92] One of the particular ways in which sleep deprivation heightens susceptibility is to make individuals more suggestible and less able to exercise good judgment.[93] When a suspect first provides an obviously inaccurate confession and is then interrogated further to secure a statement that more closely fits the crime, there is heightened risk that the final confession is false.[94] Assessing whether interrogators revealed crime details to a suspect during an interrogation can only be objectively determined if the interrogation process is videotaped.

In 2003, Illinois became the first state to enact legislation requiring police to record interrogations of suspects in homicide cases.[95] The law was enacted in the wake of dozens of Illinois exonerations, many from death row, involving false confessions.[96] Had this reform been in place in 1992, it would have allowed Rivera's jury to have an objective, thorough, and reviewable record of what took place in the interrogation room over the four days of interrogation. It would have allowed the jury to gauge how much information was fed to Rivera during the interrogation. And, it would have given the jury a visual, rather than verbal, account of Rivera's mental and physical condition during the interrogation process.[97] At present, seventeen states and the District of Columbia mandate, either by statute or court rule, the

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[90] Drizin & Leo, *supra* note 15, at 948 (finding that eighty-four percent of false confessions occurred after interrogations of six hours or longer).

[91] Chojnacki, Cicchini & White, *supra* note 71, at 16.

[92] *Id.* at 16–17.

[93] *Id.* at 17.

[94] GARRETT, *supra* note 87, at 33–34 (discussing how in seventy-five percent of the cases, the innocent suspect provided facts during the interrogation that were inconsistent with the crime).

[95] Rick Pearson, *Taped Confessions to be Law: State Will Be 1st to Pass Legislation*, CHI. TRIB., July 17, 2003, at 1. In 2013, Illinois's mandatory recording law was expanded beyond homicide cases to include interrogations of people accused of any of eight other violent felonies. 725 ILL. COMP. STAT. ANN. 5/103-2.1(b-5) (West 2006 & Supp. 2015); *see also* Act effective Jan. 1, 2014, 2013 Ill. Legis. Serv. P.A. 98-547 (West) (amending the Code of Criminal Procedure of 1963).

[96] Steve A. Drizin, *Good Reason to Tape Suspect's Interrogation: It's Done for Accused Cops; Defendants Deserve No Less*, CHI. SUN-TIMES, June 30, 2002, at 36.

[97] The trial testimony regarding Rivera's mental and physical condition varied. While medical and correctional professionals testified that Rivera suffered a physical and mental breakdown detailed in Part II, *supra*, his interrogators described Rivera as being "comfortable" and "relaxed." *See* Brief of Defendant-Appellant, *supra* note 24, at 15.

electronic recording of interrogations[98]; thirty-three states have not adopted this leading safeguard against convicting innocent defendants based on false confessions.[99]

IV. THE PROSECUTOR'S ROLE IN A CHARGING DECISION

As Professor Daniel S. Medwed, a scholar on prosecutorial ethics, argues:

> The charging decision is the tipping point for a criminal case. If the prosecutor declines to charge, the case disappears with few repercussions. If the prosecutor files charges, the state's efforts tilt towards developing a case. And once the wheels of a criminal case are set in motion toward trial, the chance of a wrongful conviction increases.[100]

The prosecutor charged Rivera by indictment and obtained a conviction before DNA tests were conducted.[101] However, as discussed below, the charging process may have contributed to solidifying the prosecutor's view of guilt, resulting in the prosecutor's subsequent unreasonable rejection of exculpatory postconviction DNA results. Many scholars have called for increasing the level of proof required to charge a defendant as a means of guarding against convicting innocent defendants.[102] However, Professor Alafair S. Burke, a former prosecutor, has drawn upon empirical research on cognitive bias to argue that elevating the standard of proof will only result in a prosecutor adhering more ardently to a theory of guilt even in the face of exculpatory evidence.[103] As an alternative to raising the standard of proof, she urges prosecutors to engage in office-wide education and training on the

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[98] Thomas P. Sullivan, *Arguing for Statewide Uniformity in Recording Custodial Interrogations*, 29 SEC. CRIM. JUST. 21, 25 (2014).

[99] *Id.* at 24–25 (reporting a New York State task force "ultimately determined that electronic recording of interrogations was simply too critical to identifying false confessions and preventing wrongful convictions to recommend as a voluntary, rather than mandatory, reform").

[100] DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 34 (2012).

[101] People v. Rivera, 962 N.E.2d 53, 56 (Ill. App. Ct. 2011) (noting that Rivera's motion for postconviction DNA testing was granted in 2004).

[102] MEDWED, *supra* note 100, at 19 ("Lifting the standard from probable cause to a level that comes closer to approximating the threshold for establishing guilt at trial (proof beyond a reasonable doubt) would certainly help weed out borderline cases and spare some innocent suspects.").

[103] Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lesson of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1605–07 (2006) (describing how a prosecutor who personally believes a defendant is guilty may "accept at face value any evidence that supports the theory of guilt" and "interpret ambiguous evidence in a manner that strengthens her faith in the case").

role cognitive bias plays in the exercise of discretion in charging decisions.

Prosecutors enjoy wide discretion in determining whether to bring charges against an individual either by indictment or information.[104] However they are ethically bound to only file a criminal charge supported by probable cause; a prosecutor must present sufficient evidence, either to a grand jury or to a judge, to support a "reasonable ground for belief of guilt."[105] As a practical matter, the prosecutor's charging decision receives little scrutiny.[106] It is virtually unreviewable, unless a defendant can meet the high burden of proving prejudice from a charging decision based on prosecutorial vindictiveness.[107]

Scholars have criticized the probable cause standard as an insufficient means of preventing the initiation of criminal charges against innocent defendants.[108] They have urged prosecutors to be "morally certain that the defendant is both factually and legally guilty"[109] and to only proceed if they are "personally convinced of the defendant's guilt."[110] Those admonishments have been endorsed by the ABA and by the National District Attorneys Association. The ABA's Prosecution Function Standards adopt the probable cause standard for initiating criminal charges and contain a higher standard

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[104] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether . . . to prosecute . . . generally rests entirely in his discretion."); *see also* Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188–96 (2010) (discussing prosecutorial discretion in charging decisions and its role in the prosecution of innocent suspects in the Duke lacrosse case).

[105] Brinegar v. United States, 338 U.S. 160, 175 (1949) (internal citation omitted) ("The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.").

[106] MEDWED, *supra* note 100, at 15 ("With some exceptions, charging decisions are essentially exempt from judicial review on the grounds that courts lack the expertise and access to evidence to second-guess these choices.").

[107] *See* Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 666–69 (2011). To prove a claim of prosecutorial vindictiveness, a defendant has to establish either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness that will give rise to a presumption of vindictiveness. *See* United States v. Goodwin, 457 U.S. 368, 374, 376, 380–81 (1982). The burden then shifts to the prosecution to justify its decision with legitimate, articulable, objective reasons. *Id.* at 374, 376 n.8.

[108] MEDWED, *supra* note 100, at 19 ("Many scholars have derided [the probable cause standard] as woefully inadequate in protecting the innocent.").

[109] Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 522 (1993).

[110] Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 316, 338–39 (2001).

for maintaining such charges, mandating that a prosecutor "should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."[111] Similarly, the National Prosecution Standards, issued by the National District Attorneys Association, also set a higher bar than the "probable cause" standard. These prosecutorial standards call upon a prosecutor to file "only those charges which he or she reasonably believes can be substantiated by admissible evidence at trial."[112]

The well-intentioned efforts to increase the amount of proof needed to charge suspects may have the unintended consequence of impeding prosecutors from rationally processing information because they are ensconced in their belief that the defendant is guilty. Professor Burke has written about the role cognitive bias plays in prosecutorial decision making.[113] She discusses empirical research showing that cognitive bias renders people's beliefs imperfect and resistant to change through: confirmation bias ("the tendency to seek to confirm, rather than disconfirm, any hypothesis under study"),[114] selective information processing (which "causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories"),[115] belief perseverance ("the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved"),[116] and the avoidance of cognitive dissonance.[117] From this, Burke posits that after prosecutors make personal determinations about the defendant's guilt, they will process additional evidence on a selective basis.[118] They will seek out information consistent with their theory of guilt, adhere to the theory even after it is disproved, and find explanations for exculpatory evidence that

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[111] ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(a) (3d ed. 1993).

[112] NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, § 4-2.2 (3d ed. 1991) ("A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.").

[113] *See, e.g.*, Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007) (describing how cognitive bias can thwart prosecutors from making neutral decisions and proposing a series of prosecutor-initiated reforms to counter the effects of cognitive bias); Burke, *supra* note 103, at 1587.

[114] Burke, *supra* note 103, at 1593–96.

[115] *Id.* at 1594, 1596–99.

[116] *Id.* at 1594, 1599–1601.

[117] *Id.* at 1593–94, 1601–02.

[118] *Id.* at 1605–06.

undermine the reliability of the evidence or reconcile it with the theory of guilt.[119] In other words, according to Burke's research, the more firmly a prosecutor believes in a suspect's guilt, the more irrationally he or she will adhere to a theory of guilt in the face of exculpatory evidence.[120]

Burke proposes alternatives to raising the probable cause standard, which focus on improving the quality of prosecutorial decision-making.[121] Those reforms include training prosecutors about the role cognitive bias plays in their decision-making,[122] encouraging prosecutors to engage in the practice of "switching sides" by generating pro-defense arguments to their interpretations of evidence,[123] and establishing a process for "fresh looks" of a file by a lawyer or committee of neutral lawyers, which may include judges, defense attorneys, or civil practitioners.[124]

It is unlikely that elevating the burden of proof required to charge defendants would have led the State to disengage the wheels of Juan Rivera's third trial. At trial, the prosecutor argued Rivera's confession constituted proof beyond a reasonable doubt of his guilt and was enough to overcome the exculpatory DNA evidence. It is possible that the prosecutors—by proceeding to trial on a theory of guilt the *Rivera* Court found "absurd," "improbable," and "unreasonable"—were operating under the constraints of confirmation bias.[125] However, as discussed in Part VI *infra*, allegations of misconduct surfaced during Rivera's civil law suit, which call into question a confirmation bias analysis. Prosecutors who make egregious charging decisions should, as Medwed and other scholars urge, face disciplinary proceedings and sanctions.[126]

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[119] *Id.* at 1605–07.

[120] *Id.* at 1590 ("Perhaps prosecutors sometimes fail to make decisions that rationally further justice, not because they fail to value justice, but because they are, in fact, irrational. They are irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality.").

[121] *Id.* at 1631.

[122] *Id.* at 1616–18.

[123] *Id.* at 1618–20.

[124] *Id.* at 1621–24.

[125] People v. Rivera, 962 N.E.2d 53, 61, 63 (Ill. App. Ct. 2011).

[126] MEDWED, *supra* note 100, at 29–34.

V. THE REMEDIES OF JUDICIAL ESTOPPEL, JUDICIAL ADMISSION & SUMMARY JUDGMENT

Ultimately, the damaging consequences of prosecuting innocent defendants occur regardless of whether prosecutors pursue an improbable case theory, "not because they are bad, but because they are human,"[127] through overzealousness,[128] or because of misconduct.[129] Judicial pre-trial interventions, which do not rely on prosecutorial discretion or self-regulation, have been advanced as means to prevent a case built upon a logic-defying theory of guilt from moving forward to trial. These solutions include the doctrines of judicial estoppel and judicial admission and the proposed reform of criminal summary judgment.

When prosecutors develop a new theory of guilt in response to exculpatory postconviction DNA evidence, it often contradicts the position they asserted at the defendant's trial to obtain the conviction. For example, in Rivera's case, the prosecutor argued at the 2009 trial that the eleven-year-old victim was sexually active, a theory that was not advanced at previous trials.[130] However, Rivera's case is not the only example of a prosecutor advancing new theories in the face of exculpatory DNA results. For example, when postconviction DNA testing excluded Earl Washington as the source of semen found on a rape and murder victim, Virginia prosecutors argued that an unidentified accomplice—the unindicted co-ejaculator—joined Washington in the crime.[131] And in Florida, the State also took a position inconsistent with what it had presented at trial in Wilton Dedge's case. Although prosecutors argued at Dedge's trial that pubic hairs found on the victim's bed matched Dedge, when postconviction DNA testing (which the

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[127] Burke, *supra* note 103, at 1591 (drawing on social science literature to explain the role cognitive bias may play in causing even virtuous and ethical prosecutors to contribute to wrongful convictions).

[128] *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Postconviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134–36, 150–56 (2004) (discussing how political pressures to obtain convictions can create a prosecutorial office culture that values winning over justice); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM J. CRIM. L. 197, 204–13 (1988) (describing factors causing prosecutors to pursue cases overzealously).

[129] Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to Do Justice*, 76 FORDHAM L. REV. 1337, 1337–38, 1348–64 (2007) (describing the prosecutor's misconduct in the Duke lacrosse case, which ultimately led to his sanction and disbarment).

[130] People v. Rivera, 962 N.E.2d 53, 61, 62–63 (Ill. App. Ct. 2011).

[131] Aviva Orenstein, *Facing The Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 413 (2011).

prosecution opposed) excluded him as the source of the hair, they argued the results were insignificant.[132]

Scholars have suggested, and case law supports, using the doctrine of judicial estoppel to prevent prosecutors from responding to exculpatory DNA test results by advancing a new theory of guilt that contradicts the factual theory relied upon at the defendant's original trial.[133] Judicial estoppel is an equitable doctrine precluding a party who asserts one position in a court proceeding from later seeking an advantage by taking a clearly inconsistent position in another court proceeding. A court may properly apply judicial estoppel when the following elements are shown: (1) a party asserts a position that is clearly inconsistent with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.[134] Although these factors are not exhaustive, they help guide a court's decision. Judicial estoppel protects the integrity of the judicial process by precluding litigants from "playing fast and loose with the courts" by "deliberately changing positions according to the exigencies of the moment."[135] However, judicial estoppel is largely a creature of civil law and when it has been applied in criminal cases, it has often been used to prevent a defendant from taking a position on appeal which is different from what was asserted at trial.[136] Despite its current lack of use against prosecutors, judicial estoppel could protect defendants from implausible arguments in

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[132] Ritter, *supra* note 15, at 835–36.

[133] *Id*. at 825. The arguments are consistent with scholarship critiquing prosecutors' use of inconsistent theories in cases involving co-defendants. *See, e.g.*, Brandon Buskey, *If the Convictions Don't Fit, You Must Acquit: Examining the Constitutional Limitations on the State's Pursuit of Inconsistent Criminal Prosecutions*, 36 N.Y.U. REV. L. & SOC. CHANGE 311 (2012) (proposing that claims of inconsistent prosecutions be analyzed under the framework of substantive due process); Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423 (2001) (arguing a defendant's right to due process is violated when prosecutors advance inconsistent positions in separate proceedings involving the same facts, and exploring theories of party admissions, collateral estoppel, and judicial estoppel as alternative means of barring prosecutors from engaging in such conduct); Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525 (1999) (discussing cases in which prosecutors argued inconsistent factual theories in successive co-defendant cases and contending this violated ethical rules, as well as the defendant's right to due process).

[134] New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001).

[135] *Id.* at 750 (internal citations omitted).

[136] Ritter, *supra* note 15, at 840–41.

response to exculpatory DNA results.

Related to judicial estoppel is the doctrine of judicial admissions.[137] Simply stated, a judicial admission withdraws from contention what was admitted.[138] For example, a court invoked the doctrine of judicial admission to bind a defense attorney in a tax fraud case who argued in closing that the government had not proven tax returns were filed, to the position that no tax returns were filed.[139] Courts also have treated a defense attorney's concession during oral argument that the government had proved intoxication as a judicial admission settling that issue.[140] The doctrine of judicial admission should bar prosecutors from arguing that more than one person participated in a rape (the "unindicted co-ejaculator" theory) after postconviction DNA tests exclude the defendant, if they argued at the defendant's original trial the crime was committed by a single perpetrator.

A proposal for criminal summary judgment proceedings has also been suggested as a pre-trial mechanism to weed out cases where the prosecution has alleged facts in the charging document for which it has probable cause, but that it cannot prove beyond a reasonable doubt at trial.[141] In civil cases, parties routinely bring motions for summary judgment to expeditiously dispose of meritless claims or defenses and to avoid unnecessary trials.[142] Some jurisdictions allow criminal defendants who have obtained complete discovery to move for pre-trial dismissal on the ground that the evidence available to the prosecution, even if taken as undisputed, fails to establish a prima facie case.[143] However, in most jurisdictions, a criminal defendant must wait until mid-trial or post-trial to make a motion to dismiss, or a motion for a judgment notwithstanding the verdict.[144] The relevant question for a court to consider when deciding the mid-trial or post-trial defense motion to

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[137] *See* Note, *Judicial Admissions*, 64 COLUM. L. REV. 1121 (1964) (describing courts' application of the judicial admissions doctrine in the context of voluntary and inadvertent admissions).

[138] *See* Brecher v. Gleason, 103 Cal. Rptr. 831, 833 n.1 (Cal. Ct. App. 1972) ("A verified assertion in a pleading is a conclusive concession of the truth of the matter pleaded. Such an assertion is not treated procedurally as evidence, but it may be relied upon by the parties and the court as part of the case.").

[139] United States v. Bentson, 947 F.2d 1353, 1356 (9th Cir. 1991).

[140] United States v. Wilmer, 799 F.2d 495, 502 (9th Cir. 1986).

[141] Leonetti, *supra* note 107, 671–73.

[142] *Id.* at 671–72.

[143] *See* 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE, CRIM. PROC. § 14.2(d) (3d ed. 2007) (describing procedures used in Vermont, Florida, Minnesota, and Washington).

[144] Leonetti, *supra* note 107, at 668–69.

dismiss is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt."[145]

Professor Carrie Leonetti offers a framework for a summary judgment procedure for criminal defendants similar to what the Federal Rules of Civil Procedure authorize in civil cases.[146] She argues that the rationales for civil summary judgment apply with equal, if not greater, force in the criminal law arena because criminal cases are "fraught with delay and are certainly costly—in terms beyond money—for their participants (defendant, victims, witnesses, judges, and juries)."[147] Leonetti concludes that defensive summary judgment motions would reduce the significant burdens defendants face as a result of ongoing criminal prosecutions based on evidence that is insufficient to sustain a conviction.[148] These consequences are far-reaching and include the stigma of arrest and charge, being separated from family and friends during pretrial detention, losing employment and liberty while confined pre-trial, the degradations of imprisonment, and the possibility of wrongful conviction.[149]

The *Rivera* Court reversed Rivera's conviction, finding there was insufficient evidence to prove his guilt beyond a reasonable doubt.[150] In doing so, it applied the standard of review utilized by jurisdictions allowing criminal defendants to move for pre-trial dismissal and by courts analyzing a mid-trial, or post-trial, motion to dismiss.[151] The *Rivera* Court ruled "[a]fter viewing the evidence in the light most favorable to the prosecution, we hold that *no* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[152] It is unlikely the proposed reform of defensive summary judgment would have prevented Rivera's 2009 conviction, because the trial court denied a motion notwithstanding the verdict, which employs a similar standard of review.[153] Nonetheless the *Rivera* Court precedent, alongside the doctrines of judicial admission, judicial estoppel, and the proposal for criminal summary judgment, offer promising means for addressing a prosecutor's logic-defying response to

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[145] Jackson v. Virginia, 443 U.S. 307, 318–19 (1979).
[146] Leonetti, *supra* note 107, at 684–97.
[147] *Id.* at 673.
[148] *Id.* at 711–12.
[149] *Id.* at 711.
[150] People v. Rivera, 962 N.E.2d 53, 67 (Ill. App. Ct. 2011).
[151] *Id.* at 60–61.
[152] *Id.*
[153] *Id.* at 60.

exculpatory postconviction DNA results and preventing cases based on improbable theories of guilt from moving forward to retrial.

VI. POSTSCRIPT

On January 6, 2012, at age thirty-nine, Rivera was released from prison into a crowd of family and supporters after the State elected not to challenge the *Rivera* Court ruling.[154] A few months later, Rivera spoke to law students about his wrongful conviction, telling them about the violence he witnessed and suffered during the nearly twenty years he was imprisoned.[155] He encouraged students to use their education to effect change, noting "You have the power to correct a lot of wrong. Never think a person in prison is lost."[156] Rivera had undergone his own transformation while incarcerated, completing his GED, devoting himself to the religious faith he found in prison and adopting a strict vegan diet as a result, and learning two languages.[157]

Nearly ten months after his exoneration, Rivera filed a federal lawsuit against law enforcement officials, alleging police coerced him into falsely confessing.[158] As the civil proceeding moved forward, additional claims of misconduct surfaced. Rivera's civil attorneys discovered that after his conviction, law enforcement found a knife near the crime scene that more closely matched the knife wounds inflicted on the victim, and did not tell the defense or the prosecution of its existence.[159] The knife was subsequently destroyed.[160] Moreover, additional DNA testing of Rivera's gym shoes supported a claim the victim's blood was planted on his shoes.[161] Finally, the DNA profile obtained from semen found in the victim's body was matched

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[154] Ruth Fuller, Andy Grimm & Lisa Black, *Rivera Free From Prison: After Nearly 20 Years and 3 Trials, Lake County Abandons Case*, CHI. TRIB., Jan. 7, 2012, at 1.

[155] Lisa Black, *Juan Rivera: 'Never Think a Person in Prison is Lost': Exonerated Ex-inmate Tells Law Students About Incarceration, Freedom*, CHI. TRIB., Apr. 4, 2012, at 8.

[156] *Id.*

[157] Ruth Fuller & Dan Hinkel, *Juan Rivera: 'I Never Lived as a Lifer': Free After Nearly 20 Years, He Details the Faith, Fears and Hope That Followed Him Out of Prison*, CHI. TRIB., Jan. 13, 2012, at 1.

[158] Steve Mills, *Lawsuit: Exonerated Man was Set Up*, CHI. TRIB., Oct. 31, 2012, at 5.

[159] Dan Hinkel & Steve Mills, *Police Destroyed Knife Found Near Site of Baby Sitter Slaying: Ex-chief Reveals Long-Secret Blade in Unsolved 1992 Case as Ex-inmate Sues Authorities*, CHI. TRIB., Jan. 22, 2014, at 6 [hereinafter *Police Destroyed Knife*].

[160] *Id.* ("[A] knife was found steps from the scene of the crime but destroyed by Waukegan police, according to interviews and documents filed in federal court in Chicago.").

[161] Steve Mills & Dan Hinkel, *Rivera Lawsuit: Police Planted Blood on Shoes: New Allegations From Man Cleared in the 1992 Killing of 11-Year-Old Holly Staker*, CHI. TRIB., Dec. 11, 2014, at 1 [hereinafter *Police Planted Blood*].

to a profile retrieved from crime scene evidence in a subsequent 2000 murder.[162] This match, Rivera's lawyers suggested, established that the State's focus on Rivera had allowed the actual perpetrator to remain free and commit an additional murder.[163]

The evidence destruction charge stemmed from the 2014 discovery that police recovered a serrated knife two years after Rivera's arrest from a neighbor living next door to the crime scene.[164] The knife was found underneath a bush between the neighbor's house and the murder scene.[165] It was turned over to police who did not notify Rivera's attorneys about the discovery, and the knife was eventually destroyed.[166] The knife, according to one of Rivera's trial attorneys, would have been "invaluable" in discrediting the reliability of the confession.[167] During Rivera's trials, prosecutors suggested a broken straight-edged knife, found before Rivera's arrest, was the murder weapon.[168] Rivera, in his confession statement, told police he broke the knife blade after killing the victim and then discarded the knife.[169] However, no physical evidence matched the broken knife to Rivera.[170] The presence of a second knife, dissimilar to the knife described in the confession, would have undermined the confession, as well as the prosecution's theory of the case.[171]

The evidence tampering charge centered on the State's early claim that the victim's blood was found on Rivera's shoes. Before the 1993 trial, prosecutors reported DNA tests showed Rivera's sneakers were stained with the victim's blood.[172] After the defense indicated it would call a witness to testify the sneakers were not for sale at the time of the slaying, the prosecutor told the court that he no longer intended to offer this seemingly important

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[162] *Id.*

[163] Dan Hinkel & Steve Mills, *$20 Million for 20 Lost Years: Juan Rivera's Settlement After DNA Exonerations in 1992 Rape, Murder Thought to be State Record*, CHI. TRIB., March 21, 2015, at 1 [hereinafter *$20 Million*].

[164] Hinkel & Mills, *Police Destroyed Knife*, *supra* note 159.

[165] *Id.*

[166] *Id.* There was also no indication police conducted any forensic testing on the knife or notified the prosecutor of its discovery. *Id*.

[167] *Id.*

[168] *Id.*

[169] Brief of Defendant-Appellant, *supra* note 24, at 10.

[170] People v. Rivera, 962 N.E.2d 53, 62 (Ill. App. Ct. 2011).

[171] Hinkel & Mills, *Police Destroyed Knife*, *supra* note 159.

[172] Robert Enstad, *Blood on Rivera Shoe Matched to Girl*, CHI. TRIB., Mar. 11, 1993, at 1.

incriminating evidence.[173] However, neither side addressed how the victim's blood wound up on Rivera's sneakers if the shoes were not sold before the murder.[174] Rivera's civil lawsuit alleged police planted the victim's blood on his shoes.[175] His civil lawyers disclosed that recent DNA testing on the sneakers detected, for the first time, a second genetic profile mixed in with the blood.[176] This second profile matched the as-of-yet unidentified suspect, whose semen was found in the victim's body, buttressing the claim authorities tampered with evidence.[177]

In June 2014, the DNA profile of the unidentified suspect in Rivera's case was matched to a profile obtained from blood on a two-by-four used to bludgeon a victim in a 2000 crime.[178] In this case, the victim was attacked by three perpetrators who broke into his home, beat him with the two-by-four, doused him with gasoline, and set him on fire.[179] He died two years later as a result of injuries sustained during the attack.[180] Police arrested Marvin Williford after the victim's girlfriend identified him as the assailant wielding the two-by-four.[181] After he was convicted, Williford, who maintained his innocence and never confessed to the crime, sought a new trial based on the DNA results from the two-by-four.[182] Prosecutors opposed his request, arguing an eyewitness identified Williford as one of the three attackers, and countering the DNA results by stating the board was handled by many people.[183] Although Williford's postconviction proceedings have not been resolved,[184] the DNA match between the two crimes illustrates the harm that occurs when an innocent person is convicted and the true perpetrator remains

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[173] Mills & Hinkel, *Police Planted Blood*, *supra* note 161. A defense investigator discovered the sneakers were not available in the country at the time of the crime and tracked down the cash register tape showing the purchase took place after the slaying. *Id*.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] Steve Mills & Dan Hinkel, *Same DNA Detected at Scenes of 2 Killings: Mystery Unfolds amid Lake County's Prosecution Woes*, CHI. TRIB., June 11, 2014, at 1. Despite the match, the identity of the potential suspect remains unknown, because the genetic profile has not yet matched that of any of convicted felon in the DNA database.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Jim Newton & Dan Hinkel, *Lake County Not Releasing Man Convicted in N. Chicago Slaying: DNA Evidence Links Weapon in Alleged Crime to Suspect in a Different Murder*, CHI. TRIB., Mar. 18, 2015, at 9.

[184] Hinkel & Mills, *$20 Million*, *supra* note 163.

free to commit additional crimes.

In March 2015, Rivera reached a $20 million settlement with the authorities named in his civil lawsuit, bringing to a conclusion the legal proceedings in his more than twenty-year quest for justice.[185] "No amount of money could ever sum up to twenty years in prison," Rivera said after the settlement was announced.[186] The harm to public safety and the erosion of confidence in the system caused by convicting innocent defendants are also not quantifiable.

This article has explored different measures to prevent cases like Rivera's, which are based on logic-defying theories of prosecution, from moving forward. Recording interrogations during the investigation phase provides a measure of police and prosecutorial accountability. Reforms to guard against charging innocent suspects, and pre-trial measures to prevent the State from advancing inconsistent theories or proceeding to trial on insufficient evidence, provide additional safeguards. However, as Rivera's case illustrates, prosecutors, as elected officials, are ultimately answerable to the citizenry.

Rivera's civil lawyers said when announcing the $20 million settlement that taxpayers in Lake County should be aware "that there's a serious price to pay when police and other actors in the criminal justice system violate individual rights."[187] In the words of Rob Warden, Rivera's case "is just one of the very highly problematic cases that have been prosecuted in defiance of common sense and overwhelming physical evidence, especially DNA evidence . . . . The people of Lake County need to wake up to what their prosecutors are doing."[188] Warden, an award-winning journalist, author, and former Executive Director of the Center on Wrongful Convictions at Northwestern University School of Law, has used the power of narrative and his extraordinary investigative journalism skills to shine a light on miscarriages of justice. In doing so, he has ensured there will be fewer arrests, prosecutions, and convictions of innocent persons, and increased the likelihood that prosecutors will exercise common sense when evaluating exculpatory DNA results.

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185 *Id.*

186 *Id.*

187 *Id.*

188 Steve Mills & Cynthia Dizikes, *Ruling: 'Nightmare of Wrongful Incarceration': Appeals Court Tosses Rivera Conviction in 1992 Stabbing Death of 11-Year-Old Girl in Lake County*, CHI. TRIB., Dec. 11, 2011, at 1.